No. 22197

In the

United States Court of Appeals

For the Ninth Circuit

CASCADE EMPLOYERS' ASSOCIATION, INC., CORVALLIS SAND & GRAVEL CO., EUGENE SAND & GRAVEL CO., and WILDISH SAND & GRAVEL CO.,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

HOISTING AND PORTABLE ENGINEERS, LOCAL UNION NO. 701,
Intervenor.

PETITIONERS' REPLY BRIEF

On Petition to Review Decision and Order of the National Labor Relations Board

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REPLY TO BRIEF OF NATIONAL LABOR RELATIONS BOARD

1. The Board concedes that petitioners may have suffered loss by reason of its failure to consider a restitution order (Bd Br 13), i.e., the Board not only could, but very possibly would have granted part or all of the requested relief. It does not deny that at the time the case was pending before it, the Board had *never* allowed restitution against a party to an unfair labor practice proceeding of sums paid to others under an illegally-co-

erced collective bargaining agreement. Nor is it denied that prior to the decision of the Oregon Supreme Court and the filing of the Board's memorandum in the United States Supreme Court in the *Sand & Gravel* case, it had *never* been contended by the Board or held by any court that claims against independent third persons who are not subject to the Board's jurisdiction are pre-empted by the Act. Finally, the Board ignores the position of this case: Petitioners do not seek from this Court an adjudication of the merits of their claim, but ask only that the case be remanded for the Board's consideration.

2. The Board argues only that, despite these things, petitioners' failure to seek restitution from the Union in the unfair labor practice proceedings was a mere "litigation error" and that petitioners are barred by § 10(e) of the Act. Using hindsight, it asserts that the scope of the Board's remedial authority to award such relief was foreseeable (although not established) in 1960 and that extensive limitations on the enforcement of private rights which have developed in recent years were foreshadowed by the holding in the second *Garmon* decision (*San Diego Bldg. Trades Council v. Garmon*, (1959) 359 US 236) that a state court cannot award tort damages for conduct arguably constituting an unfair labor practice which the Board could "restrain though it could not compensate" (359 US 236 at 246). *Garmon* did not, however, suggest that restitution from the union was

an available remedy from the Board, and *International Asso. Machinists v. Gonzales*, (1958) 356 US 617 at 621 had held that state remedies for breach of contract could be pursued in cases where relief from the Board would be unavailable.

Nor did *Garmon* suggest that pre-emption extends to claims against persons who are not subject to the Board's jurisdiction. The subsequent expansion of the Board's exclusive jurisdiction over cases seeking restitution from independent third persons who have no beneficial interest in sums paid them under a voided contract, was not foreseeable.

3. Decisions cited by the Board are not in point, and the asserted administrative "chaos" which the Board fears would result from allowing the present motion has not been established. This is not a case in which a party seeks to resurrect long-dead litigation by reason of an intervening decision in an unrelated lawsuit, e.g., *National Labor Rel. Bd. v. Pinkerton's Nat. Det. Agency*, (CA 9 1953) 202 F2d 230; *Wheeler v. N.L.R.B.*, (CA DC 1967) 382 F2d 172. Nor is it like *United States v. L. A. Tucker Truck Lines*, (1952) 344 US 33, in which there was no claim of any actual prejudice or injury resulting from the administrative procedural irregularity which was in question (see 344 US at 35-36).

We have shown, contrary to the Board's contention, that considerations of common fairness are not imma-

terial under § 10(e), and that subsequent decisions — even in unrelated cases — can constitute "extraordinary circumstances" (Pet Br 13-15). But that is not this case, in which the intervening legal developments have taken place between the same parties, involve the same subject matter and were, in effect, an extension of the same Board proceeding which is now before the Court.

Indeed, the Board argued to the United States Supreme Court that petitioners merely sought to remedy the unfair labor practice which had been the subject of the Board proceeding. Only the forum was different. A rule which recognizes the impact of new and unanticipated rules of administrative jurisdiction *which occur in the same case* will not create "chaos" in administrative procedures.

Under the best of circumstances, the shifting and uncertain doctrine of pre-emption results in great hardship and destroys genuine, albeit state-created rights. When its current scope is demonstrated only in proceedings growing out of the Board's own decision, it does not impinge on the Board's procedures to conclude that it should consider the problems which its own procedures and its newly-stated position before the Supreme Court have created.

4. This is not a case in which petitioners seek a determination of the merits of their claim from the

Court; they ask only that the Board be required to consider it. The Board misstates the holding in *N.L.R.B. v. Glass*, (CA 6 1963) 317 F2d 726 (Bd Br 13). In that case, the Board resisted a motion to remand on two grounds: That the employer could present its evidence of embezzlement in subsequent contempt proceedings, and that the case could not be remanded because the employer had filed no exceptions at all to the examiner's report. The question, therefore, was not whether the adjudication should be expedited; it was (1) whether the matter should be tried in the unfair labor practice proceeding or under the intimidating risks of a contempt proceeding; and (2) if the former, whether relief was barred by the employer's failure to file exceptions. The question of the court's authority under § 10(e) was therefore squarely presented, and the court disposed of it as follows:

> "Under Section 10(e) of the Act * * * we have the power to remand a case to the Board for the taking of further proofs. Our power in this respect is discretionary, * * * and *we may exercise it even though objections to the Board's order were not properly made* * * *. Under 'extraordinary circumstances' we may remand a case to the Board even though no exceptions were taken to the Intermediate Report. * * *" (317 F2d at 727; emphasis supplied)

5. The Board has inadvertently erred (Bd Br 1) in stating the history of this case. The state court actions

were commenced on March 23, 1964, not June 8, 1965, which was the date on which the second amended complaint was filed.

6. The Board suggests (Bd Br 8-9, fn 4) that an exception as to the remedy was required upon the second appeal to the Board, even though that question was not within the scope of the issues at that time. It ignores *N.L.R.B. v. Richards*, (CA 3 1959) 265 F2d 855 at 862, in which the Court held that "procedural fairness" requires that § 10(e) not apply in such a case.

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The Union has adopted the Board's position and contends, in addition, that the "findings and conclusions" and judgment of the Oregon Supreme Court are *res judicata* of petitioners' claims against the Union which they seek ultimately to pursue before the Board.

The contention is without merit. The Union concedes that the Oregon court decided only that the state court lacked jurisdiction of the subject matter because the actions were pre-empted by LMRA (Union Br 3). A dismissal for lack of jurisdiction is not *res judicata* in a later proceeding on the same claim in a forum which

has jurisdiction. *Costello v. United States*, (1961) 365 US 265 at 284-287 and cases there cited.

Tyler Gas Service Company v. Federal Power Com'n, (CA DC 1957) 247 F2d 590 at 594, cert den (1957) 355 US 895 was a proceeding to review an order of the Federal Power Commission. While proceedings were pending before the Commission, the petitioners, a gas company and the city with which it had a service agreement, sued to restrain their supplier from increasing its rates and for a declaratory judgment that their contracts were valid. The district court refused to issue a preliminary injunction and dismissed the complaint, on the ground that it lacked jurisdiction to grant equitable relief as to matters pending before the Commission. The Court of Appeals affirmed. Thereafter, petitioners moved before the Commission for a refund of certain sums which had been paid to the supplier during the course of the proceeding. The motion was denied, on the ground that the district court's decision was *res judicata*. The Court of Appeals reversed, saying:

> "* * * A decision dismissing a complaint for lack of jurisdiction cannot be *res judicata* as to the substantive merits of the complaint. * * *
>
> * * * * * *
>
> "We cannot see how a decision that a party must seek relief before an administrative agency can be *res judicata* of the merits of the agency's later denial of the relief requested." (247 F2d at 594)

See also Anno: 49 ALR 2d 1036 (1956).

It has twice been held that the decision of a state court that a claim is within the exclusive jurisdiction of the National Labor Relations Board is not *res judicata*, even of the jurisdictional question, in a subsequent action on the same claim in federal court. *Kipbea Baking Co. v. Strauss*, (DC ED NY 1963) 218 F Supp 696; *Thommen v. Consolidated Freightways*, (DC Or 1964) 234 F Supp 472; see also *Thomas v. Consolidation Coal Company*, (CA 4 1967) 380 F2d 69 at 84-85.

Finally, in *N.L.R.B. v. Denver Bldg. & Const. T. Council*, (1951) 341 US 675 at 681-683 the Court held that *res judicata* did not prevent the Board from deciding whether conduct charged to be an unfair labor practice affected interstate commerce, after a district court had dismissed a petition for injunctive relief under § 10(l) on the ground that it did not. The Court held that the "scheme of the statute" required that the jurisdictional decision of the Court should not foreclose the agency from making its own determination of the question.

Consequently, the decision of the Oregon Supreme Court that the subject matter of the actions was within the exclusive jurisdiction of the Board does not foreclose petitioners' right to restitution in a proceeding before the Board.

Similarly, the incidental remarks of the Oregon court about the proper interpretation of the Board's order (Union Br 2-3) are not binding in subsequent proceedings. Whether restitution from the Union will promote compliance with the Act and the national labor policy is for the Board to decide, not the Supreme Court of Oregon, whose observations were unnecessary and were merely collateral to the court's limited jurisdictional decision. Indeed, it follows from the view that those actions were pre-empted that the Oregon court could not decide the meaning of the Board's order. See *Murray v. Pocatello*, (1912) 226 US 318 at 323-324:

> "* * * Of course, if the court was not empowered to grant the relief whatever the merits might be, it could not decide what the merits were. * * *" (226 US at 324)

See also *Werner v. United States*, (CA 9 1952) 198 F2d 882 at 883; Restatement of Judgments § 49.

CONCLUSION

The petition should be granted, and the case should be remanded to the Board to consider petitioners' claim for restitution of sums paid to the trustees of the health and welfare and pension trust funds and to employees of the petitioning companies under the coerced labor agreements.

The Union's contention that issues which will be before the Board if the case is remanded are foreclosed by the decision of the Oregon Supreme Court, which held only that they must be decided by the Board, is erroneous.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of the foregoing brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Attorney